

No. AP-75,300

**IN THE COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS**

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COURT OF CRIMINAL APPEALS  
3/20/2020  
DEANA WILLIAMSON, CLERK

**Edward Lee Busby, Jr.,**

Appellant,

vs.

**The State of Texas,**

Appellee.

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**MOTION FOR STAY OF EXECUTION**

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**CAPITAL CASE**

**MR. BUSBY IS SCHEDULED TO BE  
EXECUTED ON MAY 6, 2020.**

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**TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL  
APPEALS:**

On January 28, 2020, the trial court entered an order setting Edward Busby's execution for May 6, 2020. On behalf of Mr. Busby, in an effort to prevent his execution, Counsel intends to file both a subsequent habeas application (which will raise a claim this Court has already recognized as implicating a new legal basis for relief) and a clemency petition.

The rapidly spreading coronavirus is producing an unprecedented crisis in this country, and in Texas.<sup>1</sup> It is affecting every aspect of daily functioning—including in the criminal justice system. Each day, each hour, increases the number of people and systems effected. Leaders across Texas have taken extraordinary measures to reduce the risk of transmission. Colleges and universities have extended spring break periods and moved to online-only courses; major public events have been cancelled; and officials in places like Houston have declared public health emergencies. The Office of Court Administration distributed a letter on March 12, 2020, warning that “the information on novel coronavirus (COVID-19) is changing rapidly, and the situation is becoming more concerning in the state and United States.” It advises that “Courts should schedule or suspend proceedings to avoid the

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<sup>1</sup> The World Health Organization officially declared the situation a pandemic on Wednesday, March 11, 2020. See Jamie Gumbrecht & Jacqueline Howard, *WHO declares novel coronavirus outbreak a pandemic*, CNN (Mar. 11, 2020), <https://www.cnn.com/2020/03/11/health/coronavirus-pandemic-world-health-organization/index.html>. At the time this motion is being written, there are at least 229 confirmed cases in Texas. See <https://www.worldometers.info/coronavirus/country/us/>.

gathering of large groups of people until at least April 1, including jury trials and large docket calls.”

The following day, March 13, 2020, Governor Abbott declared a state of disaster in all 254 counties of the State of Texas in response to the imminent threat of the pandemic. In response to the Governor’s proclamation, this Court, together with the Supreme Court of Texas and pursuant to Section 22.0035 of the Texas Government Code, issued its First Emergency Order Regarding the COVID-19 State of Disaster later that day. Under the Court’s order, all Texas courts may—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—modify or suspend any and all deadlines and procedures for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted.

Counsel is presently prevented from doing everything that is necessary to timely file Busby’s habeas application and clemency petition (currently due April 15, 2020) because doing so would cause him to risk becoming infected. Counsel also suspects that the work required by the judges and staff of both this Court and the Board or Pardons and Paroles, should Counsel file these documents at this time,

would subject these individuals to greater risk of becoming infected than they would otherwise be.

Moreover, the execution process itself requires the participation of particular individuals. Members of the execution and tie down team (specifically trained and not replaceable by just any TDCJ personnel), the medically-trained individual who inserts the I.V. line, the person who declares death, and the people injecting the lethal drugs, are all pivotal to the process.<sup>2</sup> If there is an absence or absences among the cast of essential figures—one that might not be known until the day before or the day of the execution—TDCJ could be unable to carry out Mr. Busby’s execution in accordance with its protocol, or the execution could be botched in an unexpected and grotesque manner.

Importantly, the act of carrying out Mr. Busby’s execution may itself assist in spreading COVID-19. Without question, executions are solemn and stressful affairs, requiring a number of state employees to carefully observe the comprehensive governing protocols. Members of the execution team who may feel compelled to attend notwithstanding known risks they have been exposed to or who may be carrying the

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<sup>2</sup> See Texas Department of Criminal Justice Execution Procedure (Apr. 2019).

virus, endanger every other person present in and around the Huntsville Unit. Each of those people then risks bringing the virus home to their families and loved ones.

Executions involve a substantial number of people functioning in various roles: the sentenced individual who is to be executed; correctional officers; a spiritual adviser; family members or other close friends of the person being executed; lawyers for the condemned; lawyers for the State of Texas and the TDCJ; prison officials; the team of individuals trained to restrain the prisoner and administer the lethal injection, including physicians; members of the victim's family or other close friends of the victim; members of the media; and other witnesses and people present in and around the execution facility.<sup>3</sup> Gathering all of these people in one location presents a substantial risk of transmission if anyone happens to be infected.<sup>4</sup> For a range of reasons,

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<sup>3</sup> See generally Tex. Code Crim. Proc. arts. 43.14-43.26; 37 Tex. Admin. Code § 152.51 (detailing authorized witnesses to an execution); TDCJ Execution Procedure (Apr. 2019).

<sup>4</sup> One of the most troubling features of the novel coronavirus is that someone may be infected or carrying it for up to two weeks without realizing he is ill. See, e.g., Stephanie Pappas, *If you have the coronavirus, how long before symptoms show up?*, Live Science (Mar. 3, 2020), <https://www.livescience.com/coronavirus-incubation-period-when-symptoms-appear.html> (“health officials estimate an incubation period of between one and 14 days”)

prisons are environments particularly susceptible to the rapid spread of an easily-communicable disease like the novel coronavirus.<sup>5</sup> Introducing unnecessary risks endangers everyone present, not only inmates but also staff—and in the case of an execution, all of the additional witnesses and parties involved.

On March 16, this Court determined that John Hummel’s execution should be stayed “in light of the current health crisis.” *In re Hummel*, No. WR-81,578-02 (Tex. Crim. App. Mar. 16, 2020). Earlier today, the Court entered an order staying Tracy Beatty’s March 25 execution. *In re Beatty*, No. WR-59,939-04 (Tex. Crim. App. Mar. 19, 2020). The same concern that led this Court to enter both its First Emergency Order Regarding the Covid-19 State of Disaster and its orders staying Mr. Hummel’s and Mr. Beatty’s executions should lead it to enter an order staying Mr. Busby’s execution.

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<sup>5</sup> See, e.g., Rich Shapiro, *Coronavirus could ‘wreak havoc’ on U.S. jails, experts warn*, NBC News (Mar. 12, 2020), <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586>; Keri Blakinger & Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, The Marshall Project (Mar. 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

### **Prayer for Relief**

Accordingly, Mr. Busby respectfully asks that this Court stay his execution, presently scheduled to occur on May 6, 2020.

Respectfully submitted,

/s/ Jeffrey R. Newberry

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### **Certificate of Service**

I hereby certify that on the 19th day of March 2020 a true and correct copy of this Motion was served upon Counsel for the State:

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/s/ Jeffrey R. Newberry

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Jeffrey R. Newberry

### **Certificate of Conference**

I hereby certify that on the 19th day of March 2020, I conferred via email with Counsel for the State, Helena Faulkner, concerning this motion. In response to the question of whether her office would oppose this motion, Ms. Faulkner wrote, “Our office will take no position either way on the motion for stay of execution.”

/s/ Jeffrey R. Newberry

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Jeffrey R. Newberry

### **Automated Certificate of eService**

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